

Louie J. Yanza
MAHER • YANZA • FLYNN • TIMBLIN, LLP
115 Hesler Place, Ground Floor
Governor Joseph Flores Building
Hagåtña, Guam 96910
Telephone No.: (671) 477-7059
Facsimile No.: (671) 472-5487

FILED
DISTRICT COURT OF GUAM
SEP 30 2005
MARY L.M. MORAN
CLERK OF COURT

Attorneys for Defendant THOMAS V.C. TANAKA

U.S. DISTRICT COURT

DISTRICT OF GUAM

UNITED STATES OF AMERICA,

CRIMINAL CASE NO. 03-00032

Plaintiff,

vs.

SENTENCING MEMORANDUM

THOMAS V.C. TANAKA,

Defendant.

I. STATEMENT OF THE CASE

On April 2, 2003, the U.S. Attorney's Office for the U.S District Court, District of Guam, filed an Information against Thomas V.C. Tanaka aka Tommy Tanaka for Misprision, a felony, in violation of 18 USC §4. The Defendant immediately pled guilty to the offense. The guilty plea was accepted and the Defendant was released on his personal recognizance.

The facts of the case stem from the Department of Public Works' ("DPW") procurement of bus shelters after Typhoon Paka struck Guam. DPW awarded to Guam Concrete Builders the bus shelter contract in December of 1997 for a total amount of \$1,915,200.00. The Defendant is the President and Chief Executive Officer

ORIGINAL

1 of Guam Concrete Builders, whose primary business purpose is to engage in
2 fabrication of pre-cast concrete panels, which have been used in the construction of
3 low-cost housing and were used for the construction and erection of bus shelters.

4 In early 1998, DPW informed the Defendant that the Federal Emergency
5 Management Agency ("FEMA") raised questions about the contracts award and that
6 two other bids were needed. At that time, DPW director, Anthony Quinata advised the
7 Defendant that Guam Concrete Builders will not lose the contract but, FEMA required
8 competitive bidding under the emergency procurement laws of Guam.
9

10 To secure FEMA's contract award Mr. Gil Shinohara, the Governor of Guam's
11 Chief of Staff, submitted a bid to DPW, which indicated a date of December 22, 1997,
12 when in fact, the bid was made in January 1998. The Defendant knew that the other
13 bids that were provided to DPW were in fact false.

14 When the Defendant was interviewed by the FBI, the Defendant stated that the
15 first bus shelter was produced on a date that was not in fact the correct date. The
16 Defendant chose this date because it was after the formal contract was entered and
17 would provide sufficient time for fabrication, following the contract signing.

18 After the Defendant pled guilty to the information, the Defendant then provided
19 testimony in the related case of United States of America v. Gil A. Shinohara, U.S.
20 District Court of Guam Case No. 03-00047-001. The Defendant testified against Mr.
21 Shinohara. Mr. Shinohara's charges arose from the false bids made in the
22 procurement of the bus shelters.
23

24
25 //

1 **II. THE DEFENDANT SHOULD BE GRANTED A VARIANCE FROM THE**
2 **RECOMMENDED GUIDELINES IN USSG § 3B1.2 BASED ON DEFENDANT**
3 **TANAKA'S MINIMAL PARTICIPATION.**

4 Prior to January 2005, the U.S. District Court of Guam had the discretion to
5 “depart” downward from a guideline of the United States Sentencing Guidelines if a
6 case was atypical and differed from the norm. *United States v. Kirk*, 938 F.2d 149 (9th
7 Cir. 1991). The a stringent mandatory guidelines outlined various basis for departures
8 based on various characteristics of both the case itself and the defendant being
9 sentenced. Of those departures is a departure based on mitigating role, which allows
10 for departure from the mandatory guideline range based on mitigating role. The
11 exception provides for a sentence below the applicable range if the defendant “was a
12 minimal participant in any criminal activity.” USSG §3B1.2. If a sentencing court finds
13 a justification for downward departure from the stringent guidelines based on this
14 exception, the sentence imposed is then tailored to account for the mitigating role.

15 In *United States v. Booker-Fanfan*, decided January 12, 2005, the United
16 States Sentencing Guidelines were deemed “advisory” by the United States Supreme
17 Court. 125 S.Ct. 738. The guidelines were stripped of their mandatory nature and
18 judges were required to merely consult the guidelines when delineating a sentence.
19 Judges are no longer bound by the strict confines of the guidelines and were granted
20 authority to take factors that were not adequately accounted for in the guidelines into
21 consideration. Under the old sentencing regime, variances from the mandates of the
22 guidelines were called “departures” because they departed from the fixed range under
23 the sentencing table. Included in the advisory status of the guidelines are the
24 exceptions that provide for departure from an unwise applicable range. As such, the
25

1 mitigating role departure/variance is also merely advisory – that is to say, that
2 requirements that were necessary to qualify for the departure are mere suggestions,
3 leaving judges the opportunity to stray from the strict qualifications required by the
4 provision.

5 In the case at hand, Defendant TANAKA meets the requirements necessary for
6 departure/variance based on his mitigating role, under the old sentencing regime.
7 Furthermore, due to the advisory nature of the guidelines, Defendant TANAKA would
8 qualify for an alternative sentence under the newly advisory guidelines, under which
9 this Court may take into account the extent and role of Defendant TANAKA's
10 participation in the commission of the current offense, along with the other factors that
11 support the imposition of a reasonable sentence. Thus, this Court should impose its
12 sentence based on Defendant TANAKA's mitigating role and other compelling factors
13 attributable to Defendant TANAKA that call for a reasonable sentence rather than a
14 sentence suggested by the guidelines.
15

16
17 **A. UNDER SECTION 3B1.2(a), THE DEFENDANT QUALIFIES FOR A**
18 **DEPARTURE/VARIANCES FOR HIS MINIMAL PARTICIPATION IN**
MISPRISION.

19 “Under this provision, the defendant's lack of knowledge or understanding of
20 the scope and structure of the enterprise and of the activities of others is indicative of
21 a role as minimal participant.” Commentary Section 4.

22 Here, the Defendant had no knowledge of the extent of Mr. Shinohara's attempt
23 to procure false bids so that FEMA would not raise questions regarding the bus
24 shelter award. Because Mr. Shinohara was the primary actor and the Defendant's
25 role was minimal, if not zero, the Defendant qualifies under §3B1.2(a).

1 In the case at hand, the Defendant's criminal history does not reflect that of a
2 person from whom the public should not trust or the public should be protected from.
3 The Defendant has no violent prior in his criminal history. And has had in fact no run-
4 ins with the law.

5
6 **III. THE DEFENDANT SHOULD RECEIVE A REASONABLE SENTENCE**
7 **BASED ON THE CONSIDERATION OF HIS UNIQUE CHARACTERISTICS BASED**
8 **ON UNITED STATES V. BOOKER AND 18 U.S.C. §3553(a).**

9 In Booker/Fan Fan, the Supreme Court held that the sentencing guidelines
10 must be considered merely as "advisory" and only one of the sentencing factors to be
11 used in conjunction with those listed for consideration during sentencing in 18 U.S.C.
12 §3553(a). 125 S.Ct. 738, 750 (2005). Under the Sentencing Reform Act, specifically
13 18 U.S.C. §3553(b)(1), the guidelines were a mandatory nature, requiring courts to
14 impose sentences based on the offense level, criminal history category, and guideline
15 range as provided for in the guideline sentencing table. Yet, in Booker, the Court held
16 that 18 U.S.C. §3553(b)(1) and 18 U.S.C. §3742(e), which made and were dependent
17 on the guidelines' mandatory nature "must be severed and excised." *Id.*, at 756.

18 Although the congressional intent in enacting the above-mentioned statutes
19 were to "provide certainly and fairness in meeting the purposes of sentencing, [while]
20 avoiding unwarranted sentencing disparities," Congress also sought to maintain
21 "sufficient flexibility to permit individualized sentences when warranted." *Id.*, at 767,
22 citing 28 U.S.C. §991(b)(1)(B). As noted in the guidelines themselves, the purpose of
23 the guidelines were to promote "honesty," "uniformity," and "proportionality" that would
24 appropriately impose "different sentences for criminal conduct of different severity."
25 USSG §1A1.1, App. Nt. 3. Yet, it is also noted that "[perfect] uniformity . . . destroys

1 proportionality.” *Id.* Explicit in this note is the notion that sentences require
2 proportionality based on factors not considered by the sentencing commission, which
3 may undercut the goal of uniformity of the guidelines. Thus, the guidelines are now
4 merely “advisory” and while judges must “consult [the] guidelines” during sentencing,
5 they are not bound to apply them. *Booker*, at 767.

6 Implicit in the goal of proportionality in sentencing is a requirement that the
7 sentence be reasonable. To achieve this, the Legislature has stated that the
8 sentencing judges shall consult Section 3553(a), which sets forth factors to take into
9 account in delineating a sentence. These factors include: the need for the sentence
10 to reflect the seriousness of the offense and to provide just punishment for such, the
11 need to protect the public from further offenses of the defendant, the need to provide
12 the defendant with correctional treatment in the most effective manner. 18 U.S.C.
13 §3553(a)(1)-(3). Furthermore, judges must also consider the nature of the offense
14 along with the character and history of the defendant. In the case at hand, as
15 previously discussed, an inquiry into the characteristics and history of the Defendant
16 reflects that of a elderly business gentleman who had no run-ins with the law. The
17 Defendant’s role in having DPW procure false bids for Mr. Shinohara was minimal, if
18 not nil. These facts are compelling in themselves as they go toward the culpability of
19 the Defendant and his ability to realize the repercussions of his actions. The sentence
20 imposed should reflect the Defendant in the most effective manner and a period of
21 imprisonment would serve neither the needs of the Defendant nor the governmental
22 interest.
23
24
25

1 Furthermore, although the charge itself should not be taken lightly, the facts
2 and circumstances surrounding the evidence leading to the Defendant's charge do not
3 substantiate a claim of potential dangerousness to the public or himself. The
4 Defendant was cited for not advising federal authorities of the false bids. Thus, the
5 actual seriousness of the underlying offense does not call for harsh punishment as
6 with the case of offense where a crime of violence against an identifiable victim. As
7 the crime did not involve a societal threat or risk of threat, there is no indication that
8 there is a substantial need to protect the public from future crimes of the Defendant.
9

10 Thus, based on the above-mentioned factors and the wide latitude granted to
11 sentencing judges in considering various factors and characteristics of a defendant in
12 the imposition of an appropriate and reasonable sentence, the Defendant respectfully
13 requests that this Court impose a reasonable sentence outside of the advisory
14 guideline range.

15 **IV. SENTENCING RECOMMENDATION**

16
17 Based on his mitigating role, Defendant TANAKA should be granted a variance,
18 what is referred to as a departure in the old guideline context, from the suggested
19 guideline range. It is anticipated Probation will establish Defendant TANAKA's total
20 base offense level at eleven (11), with a range between 8 to 14 months, with one-year
21 of supervised release to follow. However, this recommendation fails to reflect
22 Defendant TANAKA's mitigating role and the role he played in the commission of the
23 current offense. In taking to account Defendant TANAKA's role, a 4-Level variance
24 should be granted by this Court, fixing his total offense level at seven (7). Defendant
25 TANAKA has a criminal history category of 1.

1 Defendant TANAKA was cooperative when contacted by federal law
2 enforcement, has accepted responsibility, provided substantial cooperation to the
3 United States, and has expressed his sincere desire to reform and place all this
4 history behind him to move on. Thus, Defendant TANAKA respectfully requests that
5 the proposed 0-6 months period of incarceration be zero.

6
7 **CONCLUSION**

8 Based on the above, Defendant TANAKA respectfully requests that this Court
9 grant the 4-Level downward variance from the recommended sentencing guideline
10 range due to his minimal role and the substantial cooperation he has provided to the
11 United States.

12 Respectfully submitted this 29th day of September, 2005.

13
14 **MAHER • YANZA • FLYNN • TIMBLIN, LLP**
15 Attorneys for Defendant
16 **THOMAS V.C. TANAKA**

17 By:

18 
19
20
21
22
23
24
25
LOUIE J. YANZA